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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 169

LESLIE MURRAY WAIN,

Petitioner,

—against—

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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ARGUMENT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Leslie Murray Wain, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered herein on June 11, 1947 (133).[1]

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Section 347(a), and under Sections 687, 688, Title 18, U. S. C., and the Rules of

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1. All parenthetical numerical references, unless otherwise stated, are to pages in the printed record.

Criminal Procedure adopted thereunder, particularly Rule 37(b).

The Circuit Court of Appeals for the Second Circuit affirmed the judgment of conviction of the petitioner on June 11, 1947. This petition is filed within thirty days from such date (Rule 37(b) of the Rules of Criminal Procedure).

Opinions Below

There was no opinion in the District Court other than the "oral decision" which is printed at page 108 of the Record. The opinion of the Circuit Court of Appeals (L. Hand, A. N. Hand, and Frank, Circuit Judges) has not yet been officially reported. It is printed at pages 124 to 133 of the Record.

Statement of the Matter Involved

The judgment of the Circuit Court of Appeals sought to be reviewed affirmed a judgment convicting the petitioner of violating the Selective Training and Service Act of 1940 (Title 50, Appendix, United States Code, Section 311), after trial in the United States District Court for the Eastern District of New York before Honorable Matthew T. Abruzzo, District Judge.

Petitioner, having waived trial by jury, was tried by the aforesaid District Judge and found guilty (58). Thereafter, the District Judge, upon motion of the petitioner reopened the cause and heard additional testimony. He again found petitioner guilty (107, 109). Petitioner was sentenced to imprisonment for a term of six months (114).

IT WAS ERROR FOR THE CIRCUIT COURT TO AFFIRM A CONVICTION WHERE, AFTER ALL THE EVIDENCE WAS IN AND SPEAKING OF THE VERY ACT WHICH FORMED THE BASIS OF THE CHARGE AGAINST THE PETITIONER, THE TRIAL JUDGE SAID THAT HE WAS "NOT TOO SURE IT WAS DELIBERATE NOW" (107).

On this subject the Circuit Court wrote (132):

> "It is also argued that the judge did not find Wain guilty of an intent to violate the regulation because he said when referring to Wain's failure to report: 'I was a little bit sure it was deliberate at one time, I am not too sure that it was deliberate now. I think he knew he should have reported and he did not, and it may be he thought he would get back to work any day.' This statement and some statements by the judge that intent had nothing to do with the case were *ad interim* utterances during the trial which did not, in our opinion, affect the finality of his general finding."

We urge that the above is error on two grounds: First, the statement that the trial judge was "not too sure that it was deliberate now" was not an "ad interim utterance." Secondly, the trial judge definitely held, without equivocation, that the defendant's intent was not material in determining guilt. Thus, the petitioner was completely deprived of his only defense, to wit, good faith and innocent motive.

Speaking of intent, the Circuit Court has apparently overlooked the full force and effect of the Trial Judge's express finding of law on this subject. At page 68 the Trial Judge said "I don't think intention enters into it" and again "I don't think it is a question of intents at all" and again (at 70) repeated "I don't think there is a question of intents here."

When the Trial Court's attention was called to the fact that "the indictment says specifically that the acts of the defendant were committed knowingly and with knowledge or with intent" he replied "the pleader does not have to prove all he pleads" (69) and closed the discussion by ruling out the question of petitioner's intent as being immaterial to the issues involved.

The other material statements referred to by the Circuit Court as "ad interim utterances" were far from such. As the record discloses there were two trials and it was at the end of the second trial and after all of the testimony was in that the Trial Judge said, speaking of the defendant's failure to report certain matter to his draft board (107):

> "I was a little bit sure it was rather deliberate at one time. I am not too sure that it was deliberate now. I think he knew he should have reported and he didn't and it may be he thought he would get back to work any day. The company he worked for has a very bad reputation and there may be a lot behind the screen here that I can't see now. Once I find him guilty, which is what I am going to do Friday morning, then we will go into the question of the merits of what should be done."

The foregoing was no idle discussion of academic matter. It was a definitive, direct and complete determination of the issues of fact involved in the case. It must be noted that the Trial Court was never certain about the defendant's wilful conduct. At best he was "*a little bit sure it was rather deliberate,*" but at the close of the entire case he was "*not too sure that it was deliberate now*" (107). Yet in the very self-same breath and in the same paragraph the Court said he would find the petitioner guilty on Friday morning.

It is noteworthy that the Circuit Court does not attempt to defend the propriety of what they have termed "ad interim utterances." The Circuit Court attempts to rely upon the "oral decision" (108) as representing the Trial Judge's ultimate opinion. But that is not the record. The Circuit Court is only rationalizing the result to conform with the erroneous standard which it has set up for determining guilt in this case.

Moreover, the Trial Court's "oral decision" (108) far from withdrawing any of the prejudicial and erroneous declarations, actually represents an attempt to justify the foregoing pronouncements and to reaffirm them by invoking the arbitrary and fallacious presumption that non-compliance with the regulation itself spells out criminal intent (108).

It was not "ad interim" but after hearing all the proof, that the Trial Court, proceeding beyond mere refusal to accord good faith and innocent motive recognition as a defense, embraced the ultimate error of declaring that he entertained *reasonable doubt* ("not too sure") that petitioner had acted deliberately, but that he nevertheless was finding petitioner guilty. The "oral decision" (108) retracts nothing, and adds only an untenable presumption, the full prejudicial content and meaning of which, however, may not be fully appreciated, unless we take occasion to note that it is a means of carrying into final execution the erroneous "ad interim" standards of guilt and justifying their application. The Trial Court somehow felt it incumbent upon him to disregard his own findings of petitioner's lack of intent, factually arrived at, in favor of the arbitrary and fallacious presumption (apparently irrebutable except in the case of physical or mental incapacity) (25, 90), that non-compliance with the regulation spells out criminal intent and that hence such intent cannot be an issue.

The effect of this "oral decision" was that even if petitioner had honestly believed that under the regulations, directives and bulletins current at the time in question, a mere leave of absence would not and could not affect his classification because of his age and marital status; and even though the petitioner honestly believed that he was still connected with the company during such leave and was standing by waiting to be called back any day; and even though petitioner was actually engaged during the interim in other work, which was sufficient to sustain a deferred classification; and even though it was apparent from the widely publicized policy of the armed services that persons of the petitioner's age were not wanted by the army, and the Trial Judge believed the petitioner, nevertheless the Trial Judge felt, that it was incumbent upon him to reject and disregard all this as well as his own findings of lack of sufficient evidence to establish criminal intent and decide the issue, however, upon the arbitrary and fallacious presumption we have above indicated. Thus, despite the fact that the essential ingredient of bad faith or intent was judicially found lacking, the petitioner has been convicted of a felony.

This Court, in *Keegan* v. *United States,* 325 U. S. 493, 495, held that in a prosecution for violation of the Selective Service Act, the defendant was entitled to acquittal if the trier of the facts entertained reasonable doubt that the defendant had not acted in good faith and with innocent motives. The District Judge below, adopted a directly contrary position. Repeatedly in the course of the trial, the Court held that petitioner's intent was not an issue (68, 70).

THE CIRCUIT COURT PERMITTED THE TRIAL COURT'S ERRONEOUS READING OF THE REGULATION TO STAND, AND ITSELF ADDED TO THE ERROR BY REFUSING TO CONSIDER THE RELEVANCY OF SELECTIVE SERVICE POLICY TO PETITIONER'S DEFENSE.

The only offense for which the petitioner was tried, as the Trial Judge repeatedly emphasized (26, 27, 108) was violation of Section 626.1(b) of Selective Service Regulations which read, "Each classified registrant shall within 10 days after it occurs, and any other person should, within 10 days after knowledge thereof, report to the local board in writing any fact that might result in such registrant being placed in a different classification."

The Trial Court held that the circumstance that petitioner's "change of condition" was *not* one which might reasonably result in changed classification, could not be considered by him either as a defense or evidence in defense. The Trial Court declared further that he was willing to agree that if petitioner had reported to the draft board his "change in condition" (a leave of absence from his work in war production pending recall which petitioner expected any day) he would not have been deprived of his deferred classification (39, 84, 86, 27).

Petitioner had sought to show that local draft boards in New York City had been directed by Selective Service Headquarters to give deferred classification to men over 30 who were "filling a useful job in an activity reasonably necessary for the legitimate needs of the community." Petitioner while on his leave of absence from war production work had filled such useful job.

The Circuit Court disposed of these circumstances with the following comment (129-130):

"The Army Bulletins were 'restricted, confidential' information by the New York City Headquarters of the Selective Services to local boards that in the New York locality the army was not then in immediate need of men over thirty years of age, that the Army preferred younger men for military service, and that such men were then available in sufficient numbers. Consequently, the local boards were informed that men over thirty might be granted an occupational deferment if they were 'filling a useful job in an activity reasonably necessary for the legitimate needs of the community.' Bulletin No. 116, May 17, 1944, V.

In our opinion the bulletins were not intended to relieve men who had registered and obtained a classification deferring them—because engaged in war work—from notifying the local boards of facts which might result in their being placed in a different classification and in having their deferment terminated or prolonged on the ground that they were engaged in an occupation which, though not strictly for defense, was 'an activity reasonably necessary for the legitimate needs of the community.' If terminated he might be classified in I-A and if prolonged in II-A."

The Circuit Court characterizes these Bulletins as "restricted, confidential," and minimizes their tenor by indicating that the army merely "preferred" younger men and that draft boards, if they desired could defer the older men.

Entirely ignored by the Circuit Court is the fact that the substance of the "restricted, confidential" bulletins in question were front-page headline news in New York City and was featured in radio news comment to such extent that it was certain that the knowledge thereof could escape not even the most cloistered and disinterested of persons.

Moreover, the bulletins and the news reports made it clear that the armed forced considered it a matter of impelling necessity that no more men over 30 be drafted, and that draft boards were being impressed with all vigor, of the need that they co-operate in the fulfillment of the needs of the armed services.

The fact that petitioner would not be drafted but deferred eliminated all motive for him to commit a crime, and the elimination of such motive should be accorded the important consideration due it, instead of being rejected by the Circuit Court and the Trial Court, as having no relevancy in the case.

The Circuit Court's statement that it was a crime for a registrant not to report facts even though they would have no further effect than to transfer the registrant from one sub-classification of occupational deferment to another, from II-B to II-A (130), fails to deal justly with petitioner's case. It overlooks the fact that, given acceptance of petitioner's explanation that his absence from war work was merely a temporary leave which he was required to take because of a lay-off between the completion of one contract and the start of mass production on another expected contract, then it could not be reasonably expected that petitioner would be deprived of his II-B classification.

Moreover, the omission to report a fact which at the time of such omission would result in nothing further than a shift of a registrant from one sub-classification of occupational deferment to another, should not be stigmatized as a felony. The regulation does not require reports of facts which might result in change merely of sub-classification at a time when both categories alike keep the registrant out of the armed services.

In concluding our discussion under this subject it is respectfully indicated that the indictment says not a single word about classification, II-A or II-B. All it speaks of is liability for service, which is far from a change from one deferred classification to another deferred classification.

The Defendant Was Convicted of a Crime Not Charged in the Indictment.

The indictment failed entirely to state facts sufficient to constitute the offense for which petitioner was tried and found guilty,—namely violation of Section 626.1(b) of Selective Service Regulation. The charge in the indictment was that petitioner wilfully omitted and refrained from disclosing facts as to his liability to service (7-8). The act of non-disclosure of facts as to liability for service arising subsequent to the making of correct statements of such liability is not constituted an offense by the Selective Service Act.

Facts constituting a violation of section 626.1(b) of the Regulations cannot be deemed set forth in this indictment. There is no allegation that petitioner's classification was such that the interlude of non-employment alleged in the indictment was a fact which might change his classification. There is no allegation that petitioner wilfully failed to perform a duty required of him under the Regulations by failing to report facts concerning employment which might have placed the petitioner in a different classification well knowing that he held his existent classification as a result of such employment.

The indictment herein fails to meet the requirement that the essential elements of the offense for which the petitioner was tried must be alleged.

SECTION 626.1 (b) OF THE SELECTIVE SERVICE REGULATION IS SO VAGUE THAT IT FAILS TO MEET CONSTITUTIONAL STANDARDS.

When all that the registrant knows is that he is temporarily standing by awaiting momentarily expected resumption of production, and when the real facts are known only to the employer who is himself required to report termination of employment and of job status, to the draft board of the registrant, does not the text of Regulation 626.1(b) required a registrant to speculate as to its application and therefore be too uncertain to set forth a new criminal offense in accordance with due process of law?

Questions Presented

1. Did the Circuit Court err in affirming a conviction for felony where after all the evidence was in and speaking of the very act which formed the basis of the charge against the petitioner, the Trial Judge said that he was "not too sure it was deliberate now" (107)?

2. Did the Circuit Court err in affirming the judgment of conviction where the Trial Judge held that intent was not material in a crime charging failure to report certain acts, and further hold that although intent was charged in the indictment it need not be proven?

3. Did the Circuit Court err in affirming a judgment of conviction where the Trial Judge set up an arbitrary presumption of criminal intent from the mere failure to report a fact and where the Trial Court refused to consider as material, evidence which established lack of criminal intent on the part of the petitioner?

4. Did the Circuit Court err in affirming a judgment of conviction where the proof was complete that the failure

to report certain facts would not have rendered the petitioner liable for service in the armed services?

5. Did the Circuit Court of Appeals err in affirming a judgment of conviction where the indictment charged one offence and the proof purported to establish another?

6. Did the Circuit Court of Appeals err in affirming the conviction of a violation of Selective Service Regulation 626.1 (b) where such regulation was indefinite, vague and uncertain on its face, and where, under such regulation, a registrant was obliged to speculate as to whether the reporting of certain facts to his draft board *might* result in the changing of his draft classification?

7. Did the Circuit Court of Appeals err in affirming a conviction where the Trial Court refused to consider, on the subject of petitioner's intent, proof of the elimination of any motive to commit a crime because under Selective Service policy, as indicated by bulletins and widespread publicity, and known to the petitioner, he would not in any event, be inducted?

Reasons for the Allowance of the Writ

1. The decision herein sustaining conviction of petitioner upon proof held by the District Court to be insufficient as a matter of fact to remove reasonable doubt as to petitioner's guilt, departs from the accepted and usual course of judicial proceedings and is a violation of the petitioner's rights under the United States Constitution.

2. The conviction of petitioner was the direct result of a holding by the Trial Judge which appears to conflict directly with the decisions of this Court in *Keegan* v. *United States,* 325 U.S. 478, and *Bartchy* v. *United States,* 319 U.S. 484, that good faith and innocent motives constitute a defense to Selective Service violations.

3. The decision herein resulted solely from the use by the courts below of an arbitrary, fallacious and unwarranted presumption in direct conflict with this Court's holdings in *Bollenbach* v. *United States,* 326 U.S. 607, and *Tot* v. *United States,* 319 U.S. 463, which held that convictions based upon such presumptions should not be permitted to stand.

4. The decision herein holding that Selective Service Regulation 626.1 (b) was not too vague and uncertain to set forth a new criminal offense, appears to be in conflict with the principle of such decisions by this Court as *Lanzetta* v. *New Jersey,* 306 U.S. 451, and *Connelly* v. *General Construction Co.,* 269 U.S. 285.

5. The decision herein which holds criminal the failure of a registrant to report changed conditions even though they might not reasonably cause a change in classification, is apparently the result of a highly unjust and erroneous interpretation. It further conflicts with this Court's interpretation of the word "might" or "may" in criminal statutes as meaning "probably," and not merely possibly having the specified effect. (*Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U.S. 726, 738)

6. The decision herein sustaining conviction of petitioner departs from the accepted and usual course of judicial proceedings and is in violation of defendant's rights under the Fifth Amendment to the United States Constitution, in that he was convicted of a crime for which he had not been indicted.

7. The questions herein presented embody matters of Federal law which have not been, but should be settled by this Court.

WHEREFORE, petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of said Court herein, being the case numbered 20479 and entitled in its docket as *"United States of America,* Plaintiff-Appellee against *Leslie Murray Wain,* Defendant-Appellant" and that the judgment of said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated: July 1, 1947.

LESLIE MURRAY WAIN,
Petitioner.

by HENRY G. SINGER
Attorney for Petitioner
16 Court Street
Brooklyn 2, New York

HARRY SILVER
S. PAUL FISHMAN,
With him on the Petition.

I HEREBY CERTIFY that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated: July 1, 1947.

HENRY G. SINGER
Attorney for Petitioner
and a Member of the Bar
of this Court.

In the

Supreme Court of the United States

October Term, 1947.

No.

Leslie Murray Wain,

Petitioner,

—against—

United States of America.

BRIEF IN SUPPORT OF PETITION

Statute and Regulation Involved

The Federal Statute involved is section 311 of Title 50 Appendix, United States Code, and Selective Service Regulation section 626.1 (b).

Statement of Facts

The Indictment

Count I of the Indictment, which charged conspiracy to violate the Selective Training and Service Act, was dismissed upon motion of the Government (6-7, 10). Petitioner alone was tried upon Count II after severance against his co-defendants was had upon the Government's motion (10). The entire indictment was finally dismissed against all petitioner's co-defendants (114).

Count II charged that the petitioner (and the co-defendants), "beginning on or about the 15th day of May, 1944, and continuing thereafter up to December 18, 1944, • • • did unlawfully, wilfully and knowingly omit and refrain from disclosing to the Local Board duly exercising jurisdiction of defendant, Leslie Murray Wain, facts, as to the liability of said defendant, Leslie Murray Wain, for service under the Selective Service Act • • • and the Regulations duly issued" under said Act. In describing the details of the alleged offense, the indictment goes on to say that they were committed in the following manner: "That is to say: during the aforesaid period said defendants wilfully, knowingly and deliberately omitted and refrained from disclosing to the Local Board • • • the fact that the said defendant, Leslie Murray Wain, was not from September 3rd, 1944 to December 18th, 1944 employed by the Universal Camera Corporation, and that the employment of said Leslie Wain had terminated on or about September 3rd, 1944" (7-8).

The Evidence

Petitioner had entered the employ of the Universal Camera Corporation in November 1943, and according to the records of the corporation worked continuously until July 8, 1945, except for the interval between September 3, 1944 to December 18, 1944 (12-14). (There was an additional two weeks sick leave in July 1944 (31-33).) In October, 1943, petitioner was classified 1-A. On November 17, 1943, he was given a 2-A classification. On May 24, 1944, petitioner was classified 2-B (48). (His Draft Board file is in evidence as Government's Exhibit 1 (11); and his draft card is Government's Exhibit 3 (46-

47).) Petitioner was born on August 23, 1913, was married November 29, 1936 and had two children, the first born December 29, 1939 (28-29).

Charles R. Monticone, a special agent of the Federal Bureau of Investigation testified that he had asked petitioner "if he *felt*—if he knew—that he was required or had *a moral obligation* to advise his draft board that he was no longer employed, and he said he knew he should advise his local board, but that *he expected to be called back to work by the Universal Camera Corporation at any time, and therefore did not advise his board*" (20).

Petitioner testified that at the time he entered the employ of the Universal Camera Corporation in November, 1943 (30), he was working for the New York Merchandising Co. with whom he had been for a number of years. Upon assuming his duties with his new employer, he did not sever his connection with his old firm but reduced his work week with the latter to 27 hours (31).

After two weeks training, petitioner became the supervisor on the night shift, of prism assembly work, doing a regular day's work of eight hours, turning out binoculars for the armed services (30-31).

While on duty at Universal in July, 1944, he became ill and was sent home by his superior, Mr. Mulvey (31). Dr. Bresky, petitioner's physician, gave him a prescription (Defendant's Exhibit A (32)). He took a rest until the beginning of August, 1944 when a telegram from Universal's Personnel Officer summoned him back to work (33).

In September, 1944, Universal completed a government contract, and was awaiting government orders to begin on another. Pending the start of actual production, the night shift was suspended (34-35), and Mr. Mulvey stated to petitioner, "You take a leave of absence and we will

call you back." Mr. Mulvey stated further that it "could be a day or a week" when petitioner would be called back to work (35). Petitioner advised Mulvey that he would return promptly (35). During his leave of absence, petitioner worked for his old employer New York Merchandising Co. (35).

On December 18, 1944, petitioner returned to work at Universal and remained on the job until "V-J" Day in August 1945 (36). Heeding the advice of his physician, Dr. Bresky, not to work on two jobs, petitioner left the New York Merchandising Co. when he resumed active duty at Universal in December 1944 (36).

The Court asked petitioner, "Did you know you should have notified your Draft Board?" Petitioner answered, "Well, I was still connected with Universal" and explained that if he had gotten the impression that Universal was "stalling me along" he would have reported to the Draft Board (38). The Court asked, "What you mean is until the company told you 'We do not want you any more' you had no duty to go to the Draft Board." Petitioner responded, "Because I was still connected with the Company (38) and again "I felt I was still connected with Universal and was to be called back" (38). Petitioner had not been asked to surrender his badge or credentials (82). He was still on a replacement schedule between September 3, 1944 and December 10, 1944 (41).

In addition, petitioner explained he knew that during that period men over 26 were not being drafted (38). The Court refused to permit petitioner's counsel to probe the source of petitioner's knowledge or to put in evidence "the regulations and Colonel McDermott's words that the Army and Navy would not take them, and anybody who

had any job that contributed to the needs of the community would be put in 2-A, not A-1" (39).[2]

The personnel manager of Universal wrote to the Draft Board concerning petitioner on November 16, 1944 and again on December 6, 1944 this time enclosing a 42-B form (41-42).

Petitioner was not aware of the text of the letters from the personnel manager to the Draft Board (44-45). Petitioner's counsel advised the Court that there was an inaccuracy in the personnel manager's reference to ill health as the reason for petitioner's leave of absence; that petitioner's health was impaired but that petitioner would have remained on the job except for the temporary slack period (43).

Petitioner testified further that he wrote to the Draft Board on December 13, 1944 that he expected to return to work on December 18th (54). Prior to that, he had received a call from the personnel manager asking for a statement from his doctor regarding his illness (90). Appellant assumed this had reference to his July illness (91). He obtained it and sent it to the Draft Board (54). Universal informed petitioner that he should report back to work on December 18th (94).

Mulvey, petitioner's "direct boss" at Universal, testified he had signed the slip bearing the notation, "Leave of Absence, ill health, doctor's note on file" as a routine matter without reading it (76). That actually it was the temporary slowing down in production pending the expected full speed ahead on new work that was responsible for

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2. The New York Newspapers throughout the spring and summer of 1944 featured the new draft policy assigning deferment to men over 30 years of age and indeed over 26. See for example, New York Times, April 9 (p. 1); April 11 (p. 1); April 12 (pp. 1 and 13); April 18 (p 4.); May 13 (p. 20), and September 9 (p. 1).

petitioner's leave of absence. Mulvey testified that petitioner did not receive a copy of the slip or any notice of termination of employment (52-53).

Mulvey testified further that he had made samples for a new contract in August 1944 and that he had told petitioner that petitioner would be called back "as soon as the contract was in action" (51) "Please come back immediately on call" (51). Petitioner had worked full time (52).

Mulvey met petitioner four or five times during his leave of absence and had discussed his return to work. He told petitioner that the contract "looks closer" that "it could be 24 hours * * *" (71). The last conversation was within a month prior to December 18, 1944 (72).

John D. Cassidy testified on behalf of petitioner. In 1944, he had been a Commander in the United States Navy and was in charge of production in critical plants in the Third Naval District including Universal (60). He said "I was directed by the Bureau of Ships to insist that Universal Camera Corporation keep their productive staff intact for an emergency of probably having to produce this contract" (62). (Letter from Commander Cassidy to the then General Manager of Universal, on subject to keeping their organization of trained personnel intact was received in evidence as Defendant's Exhibit A) (62).

Bulletins No. 124, 126 and 122 of Selective Service, New York Headquarters were put in evidence as Defendant's Exhibit B (63).

On May 20, 1946, after all the evidence was in, argument was had before the Court on a motion in writing, made by petitioner to dismiss the indictment for insufficiency to set forth facts constituting an offense. (The motion

papers are in the record (100-103). Decision was reserved (106).)

Referring to the failure of petitioner to report, the Court stated (107):

> "I was a little bit sure it was rather deliberate at one time. *I am not too sure that it was deliberate now.* I think he knew he should have reported, and he did not, *and it may be the thought he would get back to work any day.* • • • Once I find him *guilty, which is what I am going to do Friday morning,* • • •."

On May 24, 1946, the Court, as it had announced, found petitioner guilty, and denied the motion to dismiss for insufficiency (108). The Court stated:

> "It is my opinion that this defendant did not comply with the statute which required him, after ten days, to notify the draft board of the change in status in his employment, and that he did not notify the Draft Board until some two and one-half months later of this change. He says he did not think he had to report that to the Draft Board. I believe that an intention not to comply with the statutory provisions can be spelled out of his failure to comply with the statute, especially in view of the time which elapsed between the ten-day period, which was the time in which he was compelled to notify the Draft Board and the time he actually did notify the board" (108).

ARGUMENT

I

The Circuit Court erred in sustaining petitioner's conviction where (a) the Trial Court held that intent although alleged need not be proved and, therefore, proof of good faith or innocent motive was not relevant: (b) where the Trial Court held that he was "not too sure" that petitioner's omission to report was "deliberate" and (c) where the Trial Court held that the omission to report in and of itself created a presumption of criminal intent that could not be rebutted except by proof evidencing lack of physical or mental capacity (discussion of questions presented 1, 2, 3 and 7).

A.

The Court Held That Intent, Although Alleged, Need Not Be Proved and That Proof of Good Faith or Innocent Motive Was Not Relevant.

This Court in *Keegan* v. *United States,* 325 U. S. at pp. 493-495, held that in prosecutions for violations of the Selective Service Act, the defendant was entitled to acquittal if the trier of the facts entertained reasonable doubt on the issue of the petitioner's good faith and innocent motives.

The District Judge below adopted a contrary view. When counsel for petitioner said that there was a "burden upon the government to prove that he (petitioner) refrained from doing certain things with intent * * *" the Court replied "I don't think intention enters into it". Coun-

sel for petitioner again asked "Don't you think intent or lack of intent enters into it?" Again the Court replied, "I don't think it is a question of intent at all" (68). Counsel went on to call the Court's attention to the language of the indictment "that the acts of the defendant were committed knowingly and with knowledge or with intent". The Court retorted that "the pleader does not have to prove all he pleads" (69), and the Court ended further discussion of this subject by saying, "I don't think there is a question of intents here" (70). This completely foreclosed all possibility of the consideration of the only defense that existed in the case, to wit, good faith or lack of improper motive. The Court never retreated from its original position. It never changed its rulings which excluded important evidence bearing upon intent, specifically whether appellant's discontinuance of work was "permanent or transitional" (26); whether appellant knew that the armed forces did not want "men over thirty or twenty-six" (29) although this proof bore directly on the issue of the petitioner's good faith in his omission to report the salient facts to his draft board.

Although the bulletins of the New York City Draft Headquarters were eventually received in evidence the Trial Court never withdrew its holding that these bulletins were irrelevant (57, 58) and petitioner's offer of additional proof on the subject of intent was refused, to which the proper exception was taken (66, 67).

As this Court has in effect held in *Bartchy* v. *United States,* 319 U. S. 484, and *Gorin* v. *United States,* 312 U. S. 19, where there is no motive to commit a crime such fact is relevant in determining intent, and a court is compelled to give such evidence serious consideration.

Petitioner was not obliged to do anything but "to exercise their [his] judgment in good faith in order to avoid coming into conflict with the statutes". *High Grade Provi-*

sion Company v. *Sherman,* 266 U. S. 497, 501; *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348.

Intent to commit a crime still remains a necessary element to be established by proof beyond a reasonable doubt. To let the decision in this case stand in its present form is to destroy basic law.

B.

After Ruling in Effect That He Had a Reasonable Doubt as to Petitioner's Guilt ("I Am Not Too Sure It Was Deliberate Now"), the Court Nevertheless There and Then Found the Defendant Guilty (107).

The record on this point is all sufficing (107). As we have demonstrated, at the end of two trials, after all the evidence had been heard and the Court had deliberated upon the matter for a considerable length of time, the Trial Judge stated in language clear and simple that he entertained a reasonable doubt that petitioner had deliberately failed to make his report. To then find the defendant guilty of a felony under such circumstances was a momentous departure from the substance of the standards for determining guilt of such an offense as set out by this Court. Nothing that was said later in the oral decision (108) could alter the situation. At best it was a feeble attempt to justify the Court's own holding that intent was not an issue and that a presumption—an irrebuttable presumption—took the place of proof. Nay, the presumption overcame proof that the Court itself believed.

The Circuit Court, in its opinion attempts to demonstrate that a prima facie case of guilt was made out against petitioner and that the record is not devoid of evidence to sustain a verdict of guilty. Here the Circuit Court overlooks the basic consideration that whether the trier of the

facts be jury or judge, a defendant is entitled to a verdict based on correct and fair fundamental criteria for ascertaining guilt or innocence. Erroneous instructions on the law by a Trial Judge, charging himself as the trier of the facts necessarily is as unfair to the defendant as similar error committed in a charge to a jury; a verdict of guilty by a judge who entertains reasonable doubt as to defendant's guilt is as wrong as the same verdict by a jury under like circumstances (*Amtorg Trading Corp.* v. *Higgins,* 2nd Cir., 150 Fed. 2nd, 536, 539).

C.

The Fallacious Presumption That Guilt Attaches Merely Because of Omission to Report and the Refusal to Consider Evidence in Rebuttal Thereof.

Despite the fact that the essential ingredient of bad faith has been found lacking ("not too sure it was deliberate now") the petitioner has been convicted of the felony of violating the Selective Service Act under the influence of this fallacious presumption.

To understand the full error inherent in the inference laid down by the Court as justification for the conviction of petitioner, it is necessary to consider the peculiar nature of the Regulation which petitioner was convicted of violating, namely Section 626.1(b) of Selective Service Regulations,[3] which read "Each classified registrant shall,

3. Notwithstanding the charge in the indictment, that petitioner had failed to discluose facts relative to his liability for service (6-7) it is clear that the trial and verdict were upon an *unalleged* violation of Section 626.1(b) of Selective Service Regulations and of nothing else.

Early in the trial, the Court had observed, "After ten days, it was his duty to notify the Draft Board, and that is the only charge you make here: that is right, isn't it? Mr. Greco: 'That is right.' The Court: 'The indictment stands or falls on that alone'" (26, 27). In his oral decision, the Court stated: "It is my opinion that the defendant did not comply with the statute which required him after ten days to notify the draft board of a change in status in his employment, and that he did not notify the Draft Board until some two and one-half months later of this change" (108).

within 10 days after it occurs, and any other person should, within 10 days after knowledge thereof, report to the local board in writing any fact that might result in such registrant being placed in a different classification."

Thus, whereas the other duties imposed by the statute or the regulations were unconditional duties, such as report for registration, physical examination, induction or the filing of questionnaires, the duty imposed under 626.1(b) is a qualified and conditional duty. The registrant was required to weigh the significance of any new fact in his own mind, and only if after such appraisal, he reached the conclusion that the new fact was one which reasonably "might result" in a change of classification, did the obligation of notification accrue. (Compare obligation under the instructions of Selective Service Form 42A which compelled employers to report any change in job status of registrants without regard as to whether such changes would affect the registrant's classification.) The element of preliminary judgment delegated by the regulation to the registrant is integral to the regulation, and as such it is peculiar among selective service regulations.

When a registrant, who is employed in the production of material for the armed forces is given a temporary leave of absence, in a period of slackened production between the completion of one contract and commencement of work on another, comes to consider the effect of his leave in terms of relevancy to his classification, it is indeed reasonable for him to conclude that the leave bears no significance in that regard. Particularly, would such conclusion be warranted (1) if the leave occurs at a time when Selective Service Headquarters has publicized, in press releases, headlined throughout the country, that the armed forces have determined that they will be hampered

rather than helped by further induction of men of the registrant's age;[4] (2) if during such leave he does not remain unemployed but works in an occupation further publicized by Selective Service Headquarters as acceptable for deferment; and (3) if he did report the fact he would still not be called for induction (84-85).

It must be borne in mind that a man could not be inducted into the armed forces upon his being given a leave of absence during a temporary lull in war work, and returned to civil life upon his plant's resumption of production. Thus, if high public policy assigns an individual of given age and family status to non-military activity, the basic equation is not altered by the fact that a slackened interval of production is an expected incident in such employment.

Indeed, the record in our case discloses that petitioner's avowed judgment that his leave of absence was not a fact reasonably of interest to the draft board on the score of influence upon classification, happens to have been in accord with the position of the United States Navy on the general subject. Commander Cassidy testified that he "was directed by the Bureau of Ships to insist that Universal Camera Corporation keep their productive staff intact for an emergency of having to produce this contract" (62).

Thus, we see that the armed forces realized that industry too must have its available reserves, and contemplated that liability for service was to remain unaltered for the productive staff, since otherwise they could not be kept intact.

Unless a registrant acted in bad faith in not disclosing new facts, unless he deliberately refrains from disclosing facts which, in his judgment, might result in a changed

4. Secretary of War Stimson said (N. Y. Times, April 18, 1944, p. 4, col. 1) "The need for younger men became critical early this year. * * * The average age of inductees was rising alarmingly".

classification, his conduct lacks the requisite criminal intent for conviction under Section 311 of the Selective Training and Service Act.

Criminal intent cannot be inferred from petitioner's omission to report for the reason, that, as we have shown, the omission did not exclude every other hypothesis other than that of criminal intent. (See, *Savitt* v. *United States,* 3rd Cir. 59 F. 2d 541, 543.)

Moreover, this Court itself, in *Gorin* v. *United States,* 312 U. S. 19, clearly indicated the essentiality of independent appraisal of criminal intent, in the case of prosecutions for violations of statutes or regulations which require the exercise of judgment to determine whether particular conduct is within the proscription of a criminal statute.

Even if it could be urged that an inference of criminal intent of some probative value inhered in the petitioner's omission to report, such argument would not sustain this conviction. It is abundantly clear that the Trial Judge considered the inference of criminal intent to be of such strength and scope as to be rebuttable only by proof of mental and physical incapacity (25, 90).

Certainly, the Court refused even to consider as proof of innocence, his own findings that petitioner did not act deliberately, that the petitioner expected to be called back to work any day, that he considered himself still connected with the company, that petitioner knew he would not be drafted in any event.

The fact that petitioner knew he would not be drafted eliminated all motive for him to commit a crime, and the elimination of such motive deserves serious consideration as probative of lack of criminal intent (see dissenting opinion in *U. S.* v. *Bartchy,* 132 F. 2d 348, 352, reversed by this Court in *Bartchy* v. *United States,* 319 U. S. 484).

II

The Circuit Court erred in sustaining petitioner's conviction under Regulation 626.1(b) of Selective Service Regulations in spite of the fact that there was a direct finding that had the petitioner reported his alleged change of job status he would still not be subject to induction. The Circuit Court of Appeals and the District Court refused to consider the relevancy of Selective Service policy to petitioner's defense. (Discussion of question presented 4.)

At the time set forth in the indictment petitioner was in class II-B, deferred because he was engaged in war production. As a pre-Pearl Harbor father over thirty years of age, and "filling a useful job in an activity reasonably necessary for the legitimate needs of the community" he might have been classified in II-A. Under either of these classifications he was not liable for induction into the armed forces at and during the times set forth in the indictment.

The indictment charged failure to report facts which might render the petitioner liable for service. The Circuit Court of Appeals based its decision, and we say erroneously so, upon the theory that any change in classification, whether the petitioner was liable for service or not, gave grounds for the commission of an offense under the indictment. (See p. 8, *supra.*)

The District Court agreed with petitioner's contention that as the draft situation existed at the time in question petitioner would not have been inducted. For example, the Court said: "I haven't any doubt that had this defendant reported to the draft board his change of conditions, he would not have been taken" (39). At another point

toward the close of the second trial, the Trial Court held "If he had reported this, I don't question nothing would have happened to him. Probably they would have let him alone" (84).

All during the trial the Court took the position that even if there was proof that "nothing could possibly have happened to him" (that petitioner would not have been inducted) (86), nevertheless such proof was irrelevant to the charge, and the Court was quite emphatic in saying that "what the effect of the notification of the draft board might or might not be is not for me to determine. Do you get my point?" (27).

The Trial Court read the regulation in question as if it did not contain the language "*which might*" change his classification.

The Circuit Court refused to agree with the Trial Court but decided the case on an entirely different theory. The Circuit Court found, that had petitioner reported the facts, his classification might have been changed from II-B to II-A. Thus the question is clearly posed for determination by this Court. In a situation where the District Court has heard all the evidence and has flatly refused to consider evidence which would tend to establish a complete defense to the crime charged, may the Circuit Court, upon review of the judgment of conviction, find new facts and on the basis of such new facts sustain an erroneous conclusion of law? We say, that if the District Court was wrong (and there is sufficient in the Circuit Court of Appeals opinion to believe that that Court agrees with our contention on this point) the only power that existed in the Circuit Court was to send the case back with instructions to the Trial Judge to consider the evidence under the law as set down by the Appeals Court (*Amtorg Trading Corp.* v. *Higgins,* 2nd Cir., 150 Fed. 2nd, 536, 539).

It is sheer sophistry to claim that because there were no special findings of fact therefore the general finding might be said to include anything that existed in the record to justify the Circuit Court's opinion. It was for the "jury" (here the Trial Court alone) to determine the facts and not for the Circuit Court. The power of the Circuit Court is limited in its review of facts and it may not take unto itself the power to make new findings of fact be based upon evidence which the court below had entirely refused to consider.

Petitioner had sought to show in the court below that under Classification II-A or II-B he would not be inducted, since the army did not want men over thirty years of age, who were fathers of children born before Pearl Harbor. There was no proof offered by the government to establish that even if petitioner had notified the draft board that there would have been a change in classification, no member of the draft board was called as a witness.

The Regulation used the language *"might result"* in a change of classification. We say that ordinary interpretation compels a holding that the word *"might"* means *probably.*[5] As this Court has held, in *Corn Products Refining Company* v. *Federal Trade Commission,* 324 U. S. 726, 738 (in interpreting the word "may" as used in Section 2a of the *Clayton Act,* 15 U. S. C. Sec. 13), "may" forbids only such things as *probably* and not possibly would have the effect condemned.

As we have demonstrated under our discussion of the facts the substance of the text of the bulletins, if not their precise wording, were public property and were widely publicized. (See footnote 2, page 21, *supra.*) Certainly no one

5. If a stranger failed to report would he too be guilty of a crime? The regulations (Sec. 626.1(b) requires "any other person" to report new facts to the draft board.

would dare to argue that although there was a rule which would make it impossible for the petitioner to be inducted, that because the rule was not public the petitioner had no right to claim the benefit thereof.

It should be noted, however, that the record disclosed that petitioner did know of the effect of these bulletins and so testified (38).

III

The indictment charged the offense of failing to report facts which would render the petitioner liable for service. He was tried, convicted and his conviction affirmed upon the theory that the proof established failure to report facts which might change his classification. (Discussion of question presented 5.)

Directly contrary to the provisions of the Fifth Amendment of the Constitution is the holding in this case which convicts the petitioner of one offense where he was indicted for another.

As Chief Justice Marshall said in *The Hoppett,* 11 U. S. 389, 393-4: "The rule that a man shall not be charged with one crime and convicted of another may sometimes cover real guilt, but its observance is essential to the preservation of innocence."

The indictment is in plain and simple language. If the Government had desired to charge the petitioner with failure to report an act that might change his classification, it could easily have done so. It is clear from the opinion of the Circuit Court of Appeals that petitioner was convicted of a crime not set forth in the indictment and for which he never stood trial according to the provisions of the Fifth Amendment of our Constitution. This

ruling is directly against the law laid down by the Second Circuit Court of Appeals in prior cases. For example, in *United States* v. *Byers,* 73 Fed. (2d) 419, 421, the Second Circuit reversed a conviction because defendants who were charged with fraudulent purchase of goods were convicted upon evidence which showed a fraudulent disposition of goods so purchased. The First Circuit has sustained the same rule in *Malaga* v. *United States,* 57 Fed. (2d) 822, 825.

The sufficiency of an indictment should be judged by practical and not technical considerations. An indictment must fairly inform the accused of the charge which he is required to meet. Where it fails to conform to that rule it must not be permitted to stand. *United States* v. *Hess,* 124 U. S. 483; *Federal Rules of Criminal Procedure,* Rule 7, Subdiv. C.

Prosecutions under the Selective Service Act are governed by the provisions of Section 311 of Title 50, Appendix U. S. C. entitled "Offenses and Punishment" which provides that it shall be an offense under the Act to knowingly make or be a party to the making of any false statement or certificate as to the fitness or unfitness or liability or non-liability of himself or any other person for service.

Petitioner was not charged with making a false statement as to his liability or non-liability for service. (*Cf. U. S.* v. *Virzera* (2nd Cir.), 149 F. 2d 188.) The act of non-disclosure of facts as to liability for service arising subsequent to the making of correct statements as to such liability is not constituted as an offense by the text of the aforesaid Section 311, nor is there any duty in such regard imposed by the Act. The position of the Government sustained by the Trial Court was that under the indictment, the Government was entitled to offer proof tending to show that petitioner was guilty of violating Section

626.1(b) of the Regulations adopted under the Act. The said regulation provides that, "Each classified registrant shall, within 10 days after it occurs, • • • report to the local board in writing any fact that might result in such registrant being placed in a different classification."

The indictment, however, falls significantly short of alleging facts constituting a violation of Section 626.1(b) of the Regulations. There is no allegation that the Petitioner's classification at the time of the alleged criminal non-disclosure was such that the interlude of non-employment alleged in the indictment constituted a fact which might have changed such classification. Facts constituting a violation of Section 626.1(b) of the Regulations cannot be deemed to have been set forth in an indictment which does not allege that a registrant's existent classification was dependent upon uninterrupted employment at a specified occupation, where non-disclosure of a temporary interruption of such employment is relied upon by the Government to constitute the offense.

Actually, the correct designation of an offense under 626.1(b) of the Regulations is not non-disclosure of a fact as to liability (which language nowhere appears either in the Act or the Regulations), but neglect to perform a duty required of the registrant, under the Regulations (which neglect is constituted an offense by Section 311).

IV

The Circuit Court erred in sustaining a conviction under Selective Service Regulation 626.1(b) where the terms of such regulation are so vague that men of common intelligence would differ as to meaning and application. (Discussion of question presented 6.)

The Government in its brief in the Circuit Court of Appeals said "Conceivably, there might be hypothetical cases where section 626.1(b) might be so vague in its application as to preclude a criminal prosecution for failing to comply with it" (Brief of the Government—Circuit Court of Appeals, p. 17).

It is a familiar canon of construction that specific legislation supersedes general law. If the facts are read to the effect that there was no leave of absence but a termination of employment, then the instructions on Government's Exhibit I (Selective Service Form 42a—which is part of the regulations) compelled the employer and not the registrant to report the matter to the local draft board. Even if there were a change in job status the obligation would still be that of the employer and not the registrant.

It must be borne in mind that it is the employer who knows as a matter of fact just what a leave of absence actually entails in terms of job status; whether a work stoppage of a few days or of indefinite duration is in prospect. To the registrant, the true purport of a leave of absence is not fact so much as hearsay. The employee can only guess at what a leave of absence means. The employer is under no compulsion to tell his employee the truth. Thus, it is entirely reasonable and appropriate to

read the regulations as dealing separately with the question of employment and particularly where the change in job status originates with the employer, to place upon the employer the onus of explaining the significance of the situation to the Selective Service Board. It is noteworthy that in our case, only the employer could have advised the draft board that Commander Cassidy desired that the production force be available for work under a new contract (62).

Moreover, even if as a matter of law, Regulation 626.1(b) is not to be deemed to exclude employment changes from its purview, the fact remains that a registrant's good faith is hardly to be questioned if he explains, as the defendant herein does, that he did not consider it his duty to report employment incidents to the draft board, especially when no permanent change was envisaged by defendant.

It is the instant case, and not merely some non-existent hypothetical case which illustrates and exemplifies the inherent unconstitutional vagueness of the Regulation in question as well as the deleterious consequences of such shortcoming.

The petitioner herein has in effect been told first that his guess as to the lack of necessity to report his leave of absence was wrong, and that furthermore, the very fact that he guessed wrong proves that he acted with criminal intent!

"If on its face the challenged provision is repugnant to the due process clause, specifications of details of the offense intended to be charged will not serve to validate it. *Cf. United States* v. *Reese,* 92 U. S. 214, 221; *Czarra* v. *Board of Medical Supervisors,* 25 App. D. C. 443, 453. It is the statute, not the accusation under it, that prescribes the rules to govern conduct and warns against transgres-

sion. See *Stromberg* v. *California,* 283 U. S. 359, 368; *Lovell* v. *Griffen,* 303 U. S. 444." (*Lanzetta* v. *New Jersey,* 306 U. S. 451, 453.)

The requirement that a registrant notify his draft board within 10 days of the occurrence of new facts which may result in his being put in a changed classification, requires the registrant to speculate at his peril, as to whether omission to report certain data violates the regulation. It follows that the regulation is invalid. (*Lanzetta* v. *New Jersey,* 306 U. S. 451; *Connolly* v. *General Const. Co.,* 269 U. S. 285; *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 738.)

To begin with, the registrant must speculate as to whether the use of the word "might" establishes the requirement that any facts carrying even a bare possibility of change must be reported or only those which probably would have that effect.

In *Connolly* v. *General Construction Co.,* 269 U. S. 385, 391, the Court, analyzing the cases in which statutes were upheld, despite the circumstance that they involved an element of degree as to which estimates might differ, shows that they employ words having a well-settled common-law meaning, citing *Nash* v. *United States,* 229 U. S. 373, 376. Likewise, the Court held that sufficient certainty exists where the statute "employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them. *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 502; *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348.

Here we have no common law meaning of "changed classification". Neither can that which merely probably will change classification have a technical or special meaning even if "classification" alone does have such meaning.

CONCLUSION

The writ of certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 169

LESLIE MURRAY WAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 124–133) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 11, 1947 (R. 133). The petition for a writ of certiorari was filed July 2, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner's conviction of knowingly failing to notify his draft board of a material change in his employment status was erroneous because the trial judge, sitting without a jury, made certain statements during the course of the trial and before his finding and determination of guilt, which might indicate that at the moment he (a) believed that the intent with which petitioner so failed to notify his board was immaterial, and (b) entertained a reasonable doubt of petitioner's guilt.

2. Whether the trial judge properly considered as irrelevant the question of whether petitioner might or might not have been drafted if he reported his changed employment status as required.

3. Whether the indictment sufficiently apprised petitioner of the nature of the charge made against him.

STATUTE AND REGULATION INVOLVED

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 894 (50 U. S. C. App. 311), provides in pertinent part:

> * * * any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the dis-

> trict court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

Selective Service Regulation 626.1 (6 F. R. 6843) provided in pertinent part:

> 626.1. *Classification not Permanent.*—(a) No classification is permanent. * * *
>
> (b) Each classified registrant shall, within 10 days after it occurs, * * * report to the local board in writing any fact that might result in such registrant being placed in a different classification. * * *

STATEMENT

Count 2 of a two-count indictment filed July 26, 1945 (see R. 2) in the District Court for the Eastern District of New York charged petitioner and others with having knowingly refrained from disclosing to petitioner's local draft board facts in respect of his liability for selective service, to wit, that from September 3, 1944, to December 18, 1944, he was not employed by the Universal Camera Corporation and that his employment by that company had terminated on or about September 3, 1944, in violation of Section 11 of the Selective Training and Service Act of 1940 and Selective Service Regulation 626.1 (b), *supra* (R. 7–8).[1]

[1] Count 1, charging conspiracy, was dismissed prior to the trial on motion of the Government (R. 10). Severances as

Following a trial by a judge, a jury having been waived (R. 9), petitioner was found guilty (R. 108)[2] and sentenced to imprisonment for six months (R. 114). On appeal, the judgment of conviction was affirmed (R. 133).

The evidence adduced at the trial is summarized in the opinion of the circuit court of appeals (R. 126–129), and need not be restated.

ARGUMENT

1. Petitioner contends (Pet. 3, 22–24) that his conviction was erroneous because the trial judge, who sat without a jury, expressed the view, in a colloquy with counsel during the trial, that petitioner's intent in failing to report to his draft board that he had ceased working for the Universal Camera Corporation on September 2, 1944, was immaterial (see R. 68, 70). This occurred on April 30, 1946, on which date the judge, having previously found petitioner guilty, reopened the case for the purpose of hearing further evidence (see fn. 2). Petitioner also contends (Pet. 3–6, 24–25) that it was error for the judge to convict him because the judge entertained a reasonable doubt that petitioner's failure

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to petitioner's codefendants under count 2 were also granted on motion of the Government (*ibid.*).

[2] Petitioner was first found guilty on March 29, 1946 (R. 9, 58). On motion of counsel for petitioner, the case was reopened on April 30, 1946, for the purpose of hearing additional evidence (R. 59), and on May 24, 1946, petitioner was again found guilty (R. 108).

to notify the board of his change in occupational status was deliberate. This contention is based on the following comments of the judge:

> * * * I was a little bit sure it was rather deliberate at one time. I am not too sure that it was deliberate now. I think he knew he should have reported, and he did not, and it may be he thought he would get back to work any day. * * * (R. 107).

This was said by the judge on May 20, 1946, in the course of oral argument on a motion to dismiss the indictment. As pointed out by the circuit court of appeals (R. 132), however, both the statements of the judge on April 30 and the quoted comments of May 20 were "*ad interim* utterances" and did not affect the finality of the judge's general finding. In his oral decision in which he found petitioner guilty, which occurred on May 24, 1946, the judge said:

> I find the defendant guilty, and in view of what has been said through the trial I think I should clear something up. It is my opinion that this defendant did not comply with the statute which required him, after ten days, to notify the draft board of the change in status in his employment, and that he did not notify the Draft Board until some two and one-half months later of this change. He says he did not think he had to report that to the Draft Board. I believe that an intention

> not to comply with the statutory provisions can be spelled out of his failure to comply with the statute, especially in view of the time which elapsed between the ten-day period, which was the time in which he was compelled to notify the Draft Board and the time he actually did notify the board. (R. 108.)

Clearly, there was no suggestion here that the judge thought intent immaterial or that he had any reasonable doubt of petitioner's guilt.

Petitioner, however, urges that the judge, in the quoted language, adopted an "arbitrary and fallacious presumption * * * that non-compliance with the regulation spells out criminal intent and that hence such intent cannot be an issue" (Pet. 5; see also Pet. 25–28). We submit that this conclusion is not warranted by the language. The words, "especially in view of the time which elapsed between the ten-day period, which was the time in which he was compelled to notify the Draft Board and the time he actually did notify the board," demonstrate that the judge was not presuming, from the mere failure to report, an intention to violate the regulation, but rather that he found such intention from, among other things, the long time petitioner permitted to elapse without notifying the board of his change of status. A reading of the entire record, moreover, shows that the judge was constantly endeavoring to discover what petitioner's

"state of mind" was (R. 33, 37, 46, 47, 50, 82, 83, 85), whether his failure to notify the board was "wilful" (R. 25, 28), whether he acted "intentionally * * * or not" (R. 39), why he "let this thing slide" for 3½ months (R. 40, 69, 70, 82), whether he had "any forgivable or excusable reason" for not notifying the board (R. 99), etc. In view of these repeated statements of the judge throughout the trial, we think there is no justification for imputing to him, on the basis of the record as a whole, a belief that the intent with which petitioner refrained from reporting to the board his change in occupational status was immaterial.

2. Petitioner also contends (Pet. 7–10, 29–32) that it was error for the trial judge to consider as irrelevant (see R. 27, 39, 84, 86) the fact that, even if petitioner had reported to his board his cessation of work at the Universal Camera Corporation, he probably would not have been drafted because of the Army's expressed desire for men under 30 years of age at the time.[3] It is true, as the circuit court of appeals pointed out (R. 129–130), that the New York City Selective Service Headquarters had sent to the local boards Army bulletins of a confidential nature stating that in the New York locality the Army was not then in immediate need of men over 30 years of age, and that the Army preferred younger men

[3] Petitioner was 31 years old when he stopped working at Universal on September 2, 1944 (see R. 28).

for military service. The local boards were accordingly informed that men over 30 might be granted an occupational deferment if they were "filling a useful job in an activity reasonably necessary for the legitimate needs of the community." Regulation 626.1 (b), which petitioner allegedly violated, however, required each registrant to report to his local board in writing within 10 days any fact that might result in his being placed in a *different classification* (*supra,* p. 3). Even assuming, therefore, that petitioner may not have been drafted if he notified his board that he was no longer working for Universal, it was virtually certain (and indeed was admitted by petitioner's counsel (R. 27)) that he would have lost his II–B classification ("Necessary man in war production" (see R. 126, fn. 2)). Clearly, therefore, as observed by the court below (R. 130), "the bulletins were not intended to relieve men who had registered and obtained a classification deferring them—because engaged in war work—from notifying the local boards of facts which might result in their being placed in a different classification and in having their deferment terminated or prolonged on the ground that they were engaged in an occupation which, though not strictly for defense, was 'an activity reasonably necessary for the legitimate needs of the community.' If terminated he might be classified in I–A and if prolonged in II–A."

3. Petitioner further contends that he was convicted of a crime not charged in the indictment (Pet. 10, 32–34). He points out that whereas the selective service regulation involved (*supra,* p. 3) required each registrant to report to his local board, within 10 days after it occurred, any fact that might result in his being placed in a different classification, the indictment charged him with failing to disclose facts in respect of his liability for service. The indictment, however, was specific as to the facts alleged to have been concealed, viz., petitioner's termination of employment with Universal on or about September 3, 1944, and his non-employment by that company from that time to December 18, 1944 (*supra,* p. 3). Petitioner was thus plainly put on notice of the charge he would have to meet, and the characterization of the facts allegedly not reported as "facts as to * * * liability * * * for service" (R. 8), rather than facts which "might result in [his] being placed in a different classification" (*supra,* p. 3), was manifestly not prejudicial. The proper test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense,

whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. *Hagner* v. *United States,* 285 U. S. 427, 431. Furthermore, while petitioner moved to dismiss the indictment prior to verdict (R. 100–109), the motion was based on an entirely different ground from that embodied in the present contention, which was made for the first time on appeal.[4]

CONCLUSION

The petition for a writ of certiorari presents no question, in our opinion, requiring further review by this Court. We therefore respectfully submit that it should be denied.

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[4] Petitioner also contends that the terms of Selective Service Regulation 626.1 (b) are too vague and indefinite to support a criminal prosecution and conviction for knowingly failing to comply with it (Pet. 11, 35–37). The contention is without merit. *Stassi* v. *United States*, 152 F. 2d 581, 582 (C. C. A. 5), certiorari denied, 328 U. S. 842; see also our briefs in opposition to certiorari in the *Stassi* case (No. 971, O. T. 1945, pp. 7–10), and in *Perniciaro* v. *United States.* No. 1085, O. T. 1946, pp. 8–9, certiorari denied April 14, 1947.

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